

**Department of Homeland Security****Office of the Secretary****6 CFR Part 37****Docket No. DHS-2021-0019****RIN 1601-AB03****Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes**

AGENCY: Office of the Secretary, DHS.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule delays the date for card-based enforcement of the REAL ID regulations from October 1, 2021 until May 3, 2023. Beginning on that date, federal agencies may not accept a state-issued driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID compliant driver's license or identification card issued by a state that DHS has determined is in full compliance as defined under this part. The regulations also permit federal agencies to accept for official purposes non-compliant driver's licenses and identification cards until September 30, 2021. This rule also extends that date, authorizing federal agencies to continue to accept non-compliant driver's licenses and identification cards until the end of May 2, 2023.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Interested persons are invited to submit comments before the end of [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested persons may comment on any aspect of this rulemaking rule by submitting written comments via the *Federal e-Rulemaking Portal* at <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Steve Yonkers, Director, REAL ID Program Office; telephone (202) 447-3274; email steve.yonkers@hq.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Public Participation

DHS invites interested persons to comment on any aspect of this rulemaking rule by submitting written comments via the *Federal e-Rulemaking Portal* at <https://www.regulations.gov>. Use the Search bar to find the docket, using the docket number associated with this rulemaking. Comments received, including any personal information you have provided, may be posted without change. Whenever possible, please provide citations and copies of any relevant studies or reports on which your relies, as well as any additional data which support your comment. It is also helpful to explain the basis and reasoning underlying any views expressed.

II. Background

A. The REAL ID Act, Implementing Regulations, and Phased Enforcement

The REAL ID Act (the Act) sets minimum security requirements for the issuance and production of driver's licenses and identification cards issued by the states, territories, and the District of Columbia in order for federal agencies to accept these documents for official purposes.¹ Official purposes include: (1) accessing federal facilities, (2) boarding federally regulated commercial aircraft, (3) entering nuclear power plants, and (4) any other purposes that the Secretary of Homeland Security shall determine.²

On January 29, 2008, DHS published a final rule implementing the Act's requirements.³ The regulation includes both a deadline for state compliance with the REAL ID requirements and a deadline by which individuals must obtain a REAL ID compliant license or identification card

¹ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, Div. B, title II, §§ 201 to 207, May 11, 2005, as amended (codified at 49 U.S.C. § 30301 note).

² *Id.*

³ See 73 FR 5272 (Jan. 29, 2008) (codified as amended at 6 CFR Part 37).

in order to use that document for official purposes.⁴ DHS refers to these deadlines as “state-based” and “card-based” enforcement, respectively.

For state-based enforcement, the Act and regulation prohibit federal agencies from accepting licenses and cards issued by states that are not compliant with the REAL ID standards as determined by DHS. On March 7, 2011, DHS changed the state-based enforcement deadline from May 11, 2011 to January 15, 2013.⁵

DHS then incrementally enforced this deadline through a phased-enforcement schedule, pursuant to which enforcement began at DHS headquarters, followed by enforcement at federal facilities and nuclear power plants.⁶ On January 8, 2016, DHS announced that the final phase of the enforcement schedule, applicable to individuals boarding federally-regulated commercial aircraft, would begin on January 22, 2018.⁷ Thus, since January 22, 2018, the Transportation Security Administration (TSA) has accepted driver’s licenses and identification cards only if issued by compliant states (or states with an extension or under compliance review from DHS) at screening checkpoints.

Under existing regulations, card-based enforcement is scheduled to begin on October 1, 2021.⁸ Beginning on the card-based enforcement date, federal agencies are prohibited from accepting for official purposes a license or identification card issued by a state unless the license or card itself was issued in accordance with the REAL ID standards by a REAL ID compliant jurisdiction.

In addition to compliant licenses and identification cards, states may issue, to individuals who are unable or unwilling to present the documents and information necessary to obtain a

⁴ 6 CFR 37.51(a) and 37.5.

⁵ 76 FR 12269 (Mar. 7, 2011) (codified as amended at 6 CFR 37.51(a)).

⁶ *Cf.* 6 CFR 37.51(a); DHS Releases Phased Enforcement Schedule for REAL ID (Dec. 20, 2013), *available at* <https://www.dhs.gov/news/2013/12/20/dhs-releases-phased-enforcement-schedule-real-id>.

⁷ *See* Statement By Secretary Jeh C. Johnson on the Final Phase of REAL ID Act Implementation (Jan. 8, 2016), *available at* <https://www.dhs.gov/news/2016/01/08/statement-secretary-jeh-c-johnson-final-phase-real-id-act-implementation>.

⁸ 6 CFR 37.5(b).

REAL ID compliant license, licenses and cards that are not acceptable by federal agencies for official purposes. These non-compliant licenses and cards must (1) clearly state that the card is not acceptable for official purposes, and (2) have a unique design or color indicator that clearly distinguishes them from compliant licenses and identification cards.⁹ The REAL ID regulations authorize, but do not require, federal agencies to accept these non-compliant cards until the end of May 2, 2023.¹⁰

B. Progress Towards Full Implementation

Since its enactment in 2005, DHS has worked with the states to implement the requirements of the REAL ID Act. DHS has provided funding, technical assistance, outreach, and engagement. DHS has awarded over \$263 million in grant funding to assist in enhancements to driver's license security programs.¹¹ Additionally, technical infrastructure to support systems to verify applicant information is being used by the states, which is a key security component of the Act and regulation. DHS, the states, and other stakeholders have conducted broad outreach and engagement to inform the public of REAL ID requirements and upcoming enforcement deadlines. A central and continuing goal has been to simplify the process and to make the various requirements easier to navigate, with the aim of reducing all relevant burdens and of promoting equity.¹²

These efforts have yielded significant progress towards full REAL ID implementation. Fifty-five of the 56 jurisdictions subject to REAL ID have achieved compliance with the REAL ID standards and are currently issuing REAL ID-compliant licenses and identification cards. Based on REAL ID data compiled by compliant states, DHS estimates that compliant states,

⁹ 6 CFR 37.71; REAL ID Act section 202(d)(11).

¹⁰ See 84 FR 55017 (Oct. 15, 2019) and 85 FR 23205 (Apr. 27, 2020) (codified at 6 CFR 37.5) (clarifying that the October 1, 2021 deadline by which Federal agencies may no longer accept non-compliant driver's licenses and identification cards for official purposes applies to all non-compliant cards, including state-issued driver's licenses and identification cards marked to indicate that they may not be used for official Federal purposes).

¹¹ Secure Identification State Progress Report-Fiscal Year 2012 Report to Congress.

¹² See EO 13707, Using Behavioral Science Insights to Better Serve the American People, 80 FR 56365 (published Sept. 18, 2015).

territories and the District of Columbia have issued approximately 119 million compliant licenses and cards, which represent approximately 43 percent of the population eligible for these documents.¹³ Data from the states also indicates that states have issued approximately 90 million non-compliant marked licenses and identification cards and approximately 64 million individuals still have legacy licenses without any markings that were issued before a state's compliance determination. At the current 0.5 percent REAL ID issuance rate, DHS estimates that approximately 46 percent of the population eligible for a REAL ID license will have one by the current October 1, 2021 full enforcement date. The remainder of the population would need another acceptable form of identification, where identification is required for REAL ID official purposes, including for use as identification at TSA airport security checkpoints.¹⁴

DHS has increased its level of outreach and engagement to the public and other REAL ID stakeholders, including airlines, airports, and others in the travel industry. Through these engagements, DHS has received useful feedback regarding the challenges of fully implementing REAL ID ahead of the October 1, 2021, card-based enforcement deadline.

DHS also has been working with the states and other stakeholders to identify ways to modernize the REAL ID application process and to reduce complexity and burdens. For example, DHS issued a request for information (RFI) on November 7, 2019, seeking input from the public, states, private sector entities and other interested stakeholders on ways to improve, streamline, and reduce burdens associated with the current application process through the use of new capabilities and technologies in addition to other modifications to existing application requirements.¹⁵ The RFI yielded more than 100 proposals that included suggestions for

¹³ Based on REAL ID issuance data voluntarily submitted monthly to DHS by the compliant states.

¹⁴ Although a significant segment of the population may not currently possess a REAL ID, they may have other forms of identification acceptable for official purposes (e.g., a U.S. passport, U.S. passport card, or military identification).

¹⁵ 84 FR 60104 (Nov. 7, 2019). This RFI is unrelated to a subsequent RFI issued on April 19, 2021, which seeks information to inform a rulemaking to amend the REAL ID implementing regulation, 6 CFR part 37, to address security standards and requirements for the issuance of mobile or digital driver's licenses and identification cards to enable Federal agencies to accept these credentials for official purposes as defined in the REAL ID Act and regulation. 86 FR 20320 (Apr. 19, 2021).

streamlining the application and issuance process by authorizing the submission of REAL ID applications and identity information through secure electronic or digital transmission methods. Following consideration of these proposals, DHS worked with Congress to enact the REAL ID Modernization Act, which includes a provision that would authorize states to accept REAL ID applicant information through electronic transmission methods following the issuance of regulations by DHS.¹⁶

C. Coronavirus Disease 2019 (COVID-19)

Coronavirus Disease 2019 (COVID-19), a communicable disease caused by a new (novel) coronavirus named SARS-CoV-2, is a respiratory disease that can cause fever, cough, and difficulty breathing, with reported illnesses ranging from mildly symptomatic to severe illness and death. DHS continues to monitor and respond to the COVID-19 pandemic. As of April 19, 2021, there have been over 140 million confirmed cases globally, with over 3 million confirmed deaths.¹⁷ In the United States, there have been over 31 million reported cases with over 563,000 reported deaths.¹⁸

On January 31, 2020, the Secretary of the Department of Health and Human Services declared a nationwide “public health emergency” under section 319 of the Public Health Service Act, 42 U.S.C. 274d, as a result of confirmed cases of COVID-19.¹⁹ On March 11, 2020, the World Health Organization announced that the COVID–19 outbreak can be characterized as a pandemic. On March 13, 2020, the President determined that the ongoing COVID-19 pandemic is of sufficient severity and magnitude to warrant an emergency determination under section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-

¹⁶ The REAL ID Modernization Act, Title X, Div. U of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020).

¹⁷ WHO, Coronavirus disease 2019 (COVID-19) Weekly Epidemiological Update (March 3, 2021), available at <https://covid19.who.int>.

¹⁸ CDC, COVID Data Tracker (accessed March 3, 2021), available at <https://covid.cdc.gov/covid-data-tracker/>.

¹⁹ HHS, “Determination that a Public Health Emergency Exists,” <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

5207. In addition, on March 13, 2020, the President declared a national emergency under sections 201 and 301 of the National Emergencies Act, 50 U.S.C. 1601 et seq.²⁰ More recently, on January 27, 2021, the Acting Secretary of Homeland Security issued a Secretarial Determination of National Emergency. Moreover, state and local jurisdictions throughout the United States continue to engage in various social distancing practices and other efforts to reduce and mitigate against further spread of COVID-19, including closing or reducing service times at government offices and by accepting in-person visits by appointment only.

D. DHS final rule extending the card-based deadline

Considering the impact of the COVID-19 pandemic on state and local government operations and the desire to reduce further spread by encouraging continued social distancing, in April 2020 DHS issued a final rule extending the REAL ID card-based enforcement date for one year until October 1, 2021.²¹ DHS took this action to assist the states in avoiding in-person driver's licensing agency visits and in recognition of the fact that, as a result of the pandemic, most if not all states severely curtailed driver's licensing agency operations and service hours and authorized extensions for expiring driver's licenses.

III. Further extending the card-based enforcement deadline

Notwithstanding the substantial progress made towards full REAL ID implementation, the Secretary recognizes that significant challenges persist with full REAL ID enforcement in the current environment. The outbreak and continued spread of COVID-19 has significantly disrupted the daily lives and activities of all Americans. It has shifted priorities and severely curtailed daily interactions. In important respects, it has had an especially severe impact on low-income communities, those in ill health, and the elderly. To limit exposure and reduce the chance of transmission, state and local government offices continue to operate at limited

²⁰ Proclamation 9994 of Mar. 13, 2020 on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

²¹ 85 FR 23205 (Apr. 27, 2020).

capacity, provide remote services, or, in some cases, remain temporarily closed to the public.²²

Additionally, some states continue to authorize grace periods and extensions to those with expiring licenses as a further way to avoid in-person contact and mitigate risks to the health and safety of the public and state government employees.

DHS recognizes the continuing impact these disruptions are creating on the ability of many individuals to obtain a REAL ID compliant license or identification card before October 1, 2021. DHS also recognizes that these disruptions have had a particularly severe effect on some vulnerable subpopulations. Moreover, the Secretary recognizes the importance of social distancing, and with the commitments to fairness and equity in mind,²³ is taking this action to assure the public that there is no need to visit a state driver's licensing agency to obtain a REAL ID document at this time.

Accordingly, the Secretary is extending the date by which individuals must obtain a REAL ID license or identification card to use that document for official purposes until May 3, 2023. This extension is intended to provide sufficient time for DMVs across the country to fully reopen in-person services. A safe and sustained reopening of in-person services is necessary to meaningfully improve upon the current 0.5 percent REAL ID issuance rate. As noted above, at the current 0.5 percent REAL ID issuance rate, DHS estimates that approximately 46 percent of the population eligible for a REAL ID license will have one by the current October 1, 2021 full enforcement date. DHS believes that such an outcome would result in lengthy delays at airport security checkpoints and significant inconvenience to the traveling public.

Moreover, DHS anticipates that the additional time provided by this extension should be sufficient for states to implement and benefit from recent and potential future changes to the

²² Individuals should check with their state DMV for policies and guidance on license issuance and renewals and other services during the disruption caused by COVID-19.

²³ See EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 FR 7009 (published Jan. 25, 2021); EO 13563, Improving Regulation and Regulatory Review, 76 FR 3821 (published Jan. 21, 2011).

REAL ID issuance process. For instance, a provision of the REAL ID Modernization Act allows states to immediately stop requiring applicants to provide separate physical documentation of a Social Security account number. This flexibility, which would reduce the burden on applicants and may in some cases help applicants avoid return trips to the DMV, has yet to be implemented in all states. In addition, also consistent with the REAL ID Modernization Act, DHS is considering issuing regulations authorizing new procedures for the electronic presentation of documents, which may allow for a more rapid and socially distanced issuance process. DHS requires time to develop such regulations, and states would require time for implementation.

Finally, to avoid any confusion about the ability of federal agencies to continue to accept certain non-compliant licenses and identification cards issued under § 37.71, DHS also is extending the date by which federal agencies may continue to accept these licenses and identification cards for official purposes until the end of May 2, 2023. Although some agencies, including TSA, accept these licenses and identification cards for official purposes, others may decide not to accept, or currently do not accept, non-compliant marked cards for official purposes. Individuals who need to visit a federal facility, building, or office should check in advance whether the agency requires identification for access purposes and, if they do, the forms of identification they accept.

IV. Regulatory Analysis

A. Administrative Procedure Act

DHS takes this action without prior notice and public comment, but welcomes comment on all aspects of the action.

Sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. 553) authorize agencies to dispense with certain rulemaking procedures when they find good cause to do so. Under section 553(b), the requirements of notice and opportunity to comment do not apply when the agency for good cause finds that these procedures are “impracticable, unnecessary, or

contrary to the public interest.” Section 553(d) allows an agency, upon finding good cause, to make a rule effective immediately, thereby avoiding the 30-day delayed effective date requirement in section 553.

This interim final rule recognizes the need to extend the card-based enforcement deadline in light of the significant disruption and uncertainty in government operations now being caused by the COVID-19 virus, as well as the need to encourage appropriate social distancing behavior. October 1, the previous deadline, is merely five months away, and a notice-and-comment process would mean continuing uncertainty for state and local governments, for airlines, for travelers, and for numerous others. As also noted, many state and local government offices are operating at limited capacity. Some of them are providing remote services; some of them are closed to the public. In addition, many states are continuing to curtail driver’s licensing agency operations and service hours and have authorized extensions for expiring driver’s licenses. These restrictions are making it unusually difficult for many people (especially those in certain regions or in vulnerable groups, including those who are in poor health) to do what is required to obtain REAL-ID.

In these circumstances, delaying the change to the regulation’s enforcement date by first undergoing notice and comment would impede planning, would lead to undue uncertainty, and could produce serious unfairness. It would be contrary to the public interest, as an expeditious regulatory announcement of the new deadline is necessary for state and individual planning purposes. These factors suggest that delays associated with notice and comment rulemaking would potentially undermine critical public health efforts at the federal, state, territorial, or local level. DHS therefore has good cause to bypass such procedures, while also welcoming comments on all aspects of this action.

B. Paperwork Reduction Act

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

C. Executive Orders 12866 and 13563 Assessment

This rule constitutes a “significant regulatory action” under Executive Order 12866, as supplemented by Executive Order 13563, and therefore has been reviewed by the Office of Management and Budget (OMB). Executive Order 12866 defines “significant regulatory action” as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. DHS is proceeding under the emergency provision at Executive Order 12866 Section 6(a)(3)(D) based on the urgent needs described above.

D. Regulatory Flexibility Act Assessment

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal agencies to consider the potential impact of regulations on small businesses, small government jurisdictions, and small organizations during the development of their rules. This rule, however, makes changes for which notice and comment are not necessary. Accordingly, DHS is not required to prepare a regulatory flexibility analysis. See 5 U.S.C. 603, 604.

E. Executive Order 13132 (Federalism)

A rule has federalism implications under Executive Order 13132, “Federalism,” if it has a substantial direct effect on state governments, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various

levels of government. DHS has analyzed this rule under that Order and has determined that although this rule affects the states, it does not impose substantial direct compliance costs or preempt state law. In fact, the rule is responsive to concerns expressed by state agencies regarding the upcoming deadlines. DHS has determined that the rule is consistent with Executive Order 13132.

F. Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Unfunded Mandates Reform Act addresses actions that may result in the expenditure by a state, local, or Tribal government, in the aggregate, or by the private sector of \$100 million (adjusted for inflation) or more in any one year. This rule will not result in such an expenditure.

G. Executive Order 13175 (Tribal Consultation)

This rule does not have Tribal Implications under Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

H. Environment

DHS reviews proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023-01 Rev. 01 (Directive) and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not

individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(2)(ii), 1508.4. For an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual section V.B(2)(a)-(c).

The delay effectuated by this rule fits within categorical exclusion A3(a) “Promulgation of rules ... of a strictly administrative or procedural nature.” Instruction Manual, Appendix A, Table 1. Furthermore, the rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental impacts. Therefore, the rule is categorically excluded from further NEPA review.

List of Subjects in 6 CFR Part 37

Document security, Driver’s licenses, Identification cards, Motor vehicle administrations, Physical security.

The Amendments

For the reasons set forth above, the Department of Homeland Security amends 6 CFR part 37 as follows:

PART 37 – REAL ID DRIVER’S LICENSES AND IDENTIFICATION CARDS

1. The authority citation for part 37 continues to read as follows:

Authority: 49 U.S.C. 30301 note; 6 U.S.C. 111, 112.

Subpart A—General

2. In § 37.5, revise paragraphs (b) and (c) to read as follows:

§ 37.5 Validity periods and deadlines for REAL ID driver's licenses and identification cards.

* * * * *

(b) On or after May 3, 2023, Federal agencies shall not accept a driver's license or identification card for official purposes from any individual unless such license or card is a REAL ID-compliant driver's license or identification card issued by a State that has been determined by DHS to be in full compliance as defined under this subpart.

(c) Through the end of May 2, 2023, Federal agencies may accept for official purposes a driver's license or identification card issued under § 37.71. On or after May 3, 2023, Federal agencies shall not accept for official purposes a driver's license or identification card issued under § 37.71.

Alejandro N. Mayorkas,
Secretary